Supreme Court U. S.
JUN 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1901

ROBERT S. PERSKY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

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ROBERT S. PERSKY,

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v.

UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner Robert S. Persky prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 1, 1974, in this proceeding.

Opinion Below.

The opinion of the Court of Appeals, reprinted in the appendix hereto, is reported at F. 2d [not officially reported]. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 1, 1974. A timely petition for rehearing was denied on April 30, 1974. On May 21, 1974, Mr. Justice Marshall signed an order extending the time for filing this petition for a writ of certiorari to and including June 21, 1974. The jurisdiction of this court is involved under 28 U. S. C. Sec. 1254(1).

Questions Presented.

1. Whether, after an acquittal on a count alleging a conspiracy to file a false document, a verdict of guilt on a count alleging a false filing, must be set aside where the trial judge when given the opportunity by a novel sequence of events refused to (i) instruct the jury to ignore the hearsay evidence admitted on the conspiracy count or to (ii) grant a mistrial because such instruction would have been futile or (iii) grant a motion for a new trial.

2. Whether the jury having acquitted petitioner of the conspiracy charge on June 12, 1973, the petitioner was entitled to a judgment of acquittal on the substantive count of which he was found guilty on June 13, 1973, by reason of collateral estoppel by judgment or *res judicata* because of the fact that the substantive count incorporated by reference the heart and substance of the conspiracy count.

3. Whether, in view of the social and Watergate environment existing at the time of the trial, the trial court abused its discretion in refusing to include in the *voir dire* questions requested by petitioner relating to the possible bias of jurors against attorneys.

Statute Involved.

Title 15, U. S. C. §78ff(a):

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report,

or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of Section 780 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Statement of the Case.

Petitioner Robert S. Persky, an attorney, was tried on two counts, along with two accountants.

Count One of the indictment charged that petitioner conspired with others, including the two accountants, to make or cause to be made a false financial statement for a corporation by the name of Microthermal Applications, Inc. ("Microthermal") which was filed as a portion of Form 10-K (an annual report form) with the Securities and Exchange Commission ("SEC").

Count Two of the indictment charged petitioner with the preparing and filing of a false financial statement on Form 10-K for Microthermal with the SEC, and aiding and abetting in the preparing and filing of such a false statement. Count Two incorporated by reference the overt acts charged in Count One with respect to the conspiracy allegations.

The jury acquitted petitioner on Count One alleging conspiracy to file the same Form 10-K. The jury returned, on successive days, a verdict of not guilty on

the conspiracy count and a verdict of guilty on the substantive count. Upon this finding of guilt of preparing and filing a false financial statement petitioner was sentenced to a term of two years of which all but four months was suspended. Motions for a judgment of acquittal and for a new trial were denied. On appeal, the Second Circuit affirmed the conviction.

The trial consumed in excess of five weeks. The indictment which included additional charges against the accountants relating to obstruction of justice and perjury was characterized, because of its complexity, by the trial judge as:

> "* * * one of the most frightening indictments I have ever picked up * * *" (R. 3646).[1]

The government's version of the facts adopted by the Court of Appeals was characterized by the Court of Appeals as "Byzantine" (App. 3a).

Petitioner is a graduate of the Harvard Law School with an impeccable record of twenty years before the bar including service in the military, as law secretary to a federal judge, assistant counsel to the Waterfront Commission of New York Harbor and as a name partner in a forty-man law firm (R. 3105-3116).

The chief government witnesses, Messrs. Galanis and Yamada, were confessed professional confidence men, who included among their victims, Keith Funston, a former head of the New York Stock Exchange, J. Richardson Dilworth, President of the Rockefeller Brothers Foundation and Lawrence Ellman, President of Longchamps, Inc. (R. 515).

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[1] R refers to the trial transcript.

Petitioner was a member of the law firm which was counsel to Microthermal and Secretary of Microthermal (an unsalaried ministerial post).

The government at no time contended that petitioner received any of the allegedly dissipated funds.[2]

The government in its answer to the bill of particulars and on the record conceded that petitioner received no unlawful compensation.[2] Defendant's testimony that he never sold any of the Microthermal shares acquired by him, his wife and law firm was uncontradicted (R. 3122).

The Form 10-K was alleged to be false in that the balance sheet of Microthermal included therein set forth as an asset,

"cash and cash items—$525,024."

which the government contended their chief witnesses John Galanis (Galanis) and Akiyoshi Yamada (Yamada) had dissipated at the "as of" date of the financials.

There were a total of thirty witnesses of whom twenty-five were substantive witnesses and five were character witnesses. Of the twenty-five (25) substantive witnesses, sixteen (16) were government witnesses. Of the sixteen (16) government witnesses, twelve (12) were witnesses whose testimony was in whole or substantial part directed to Count One, the conspiracy count.

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[2]The recitation of "facts" by the Court of Appeals at App. 1a contains a recital at the top of the page and in footnote 2 that appears to ignore (i) the government's answer to the bill of particulars and (ii) the fact that the government did not contend petitioner received any of the dissipated funds. Petitioner's position is that footnote 2 is the result of the failure of the Court of Appeals to fully comprehend a portion of the testimony and exhibits.

The testimony of those twelve (12) witnesses filled approximately 2,250 pages of the 4,121 pages of trial transcript. Of the 4,212 pages of transcript, approximately 3,400 contain testimony and the balance consist of opening and closing statements, the charge to the jury and colloquy.

The testimony of Charles Fischer (R, 990-1168), Frank S. Woodruff (R, 1168-1296), Mortimor Schor (R, 1296-1387), Gilbert N. Losurdo (R, 1387-1455), Steven C. Burns (R, 1804-1986) and Joseph Rozzo (R, 1986-2002) was solely related to the conspiracy.

Thus, two-thirds of the testimony heard by the jury consisted in whole or part of matter relating to Count One, the conspiracy count.

The jury deliberated two and one-half days with respect to the indictment. At the end of the second day it found petitioner innocent of the conspiracy charge. After an Allen charge on the next day it found petitioner guilty of the substantive offense.

The instant case presents a situation which the Court of Appeals agreed was novel (App. 9a-10a) in that the jury acquitted the defendant on the conspiracy charge alleged in Count One, one full day prior to reaching a verdict on the substantive count.

As a result of the trial court's refusal to render supplemental instructions there remained before the jury in its consideration of the substantive count the mass of evidence which petitioner contends was admissible solely on the conspiracy count. Furthermore, the sequence left the court without an effective means of exorcising from the minds of the jurors those portions of the 4,000-page record which should have been before the jury solely on the substantive count. The trial court, moreover, refused

to attempt to give the jury instructions when the problem became clear (R. 4196).

The testimony of Galanis (R. 217-989) and Yamada (R. 1486-1803) was, in large part, insofar as it related to petitioner, the narration of statements of Morton Kaplan, Microthermal's President, allegedly quoting or involving petitioner. This double hearsay was admitted by the trial court under the co-conspirator exception to the hearsay rule.

Kaplan was named as a co-conspirator but was not called by the government as a witness. Prior to trial he pleaded guilty to the conspiracy count.

It is significant in relationship to petitioner's position on the hearsay evidence that the "fact portion" of the opinion of the Court of Appeals relies, in part, on facts relating to Kaplan's state of mind and acts which, since Kaplan did not testify, could only have become fixed in the mind of the Court of Appeals through the hearsay evidence.

e. g.:

> "Morton Kaplan, President of Microthermal, had other plans in mind for these monies" (App. 3a).
>
> "No sooner had Kaplan completed these transfers as a loan in violation of the prospectus then he set about concealing the fact" (App. 3a).

A fair chronology of the undisputed portions of the alleged conspiracy can be summarized as follows: Fisher at the request of Richard Kirschbaum (a co-conspirator who did not testify at the trial) initiated a series of transactions which resulted in the issuance of one letter

"confirming" the existence of a certificate of deposit ("CD") owned by Microthermal on May 14, 1970, and two letters (different versions of the same letter) on June 10, 1970, by Franklin National Bank. Certain of these letters were later to be relied upon by the accountants for Microthermal.

To initiate the scheme to obtain the letters, Fisher, acting on the request of Kirschbaum, called the Franklin National Bank and ascertained the going interest rate on CDs. He then arranged for one of his clients, the Neuwirth Fund, to agree to purchase a $500,000 CD at an effective yield slightly above the going interest rate in what Fisher termed the primary market for CDs. The method by which the yield was increased to the Neuwirth Fund was by the delivery of a check representing additional interest to the Neuwirth Fund so that the sum of that check together with the principal of the Certificate of Deposit and accrued interest on the maturity date would give a greater yield than had Neuwirth purchased CD directly from Franklin National Bank. The ultimate source of the additional funds was to be Galanis and Yamada.

Fisher then called Frank Woodruff of Franklin National Bank and requested that he purchase a bearer CD in the sum of $500,000 for Microthermal and deliver it to the Bank of New York against payment. Simultaneously, the Neuwirth Fund gave instructions to the Bank of New York, its custodian bank, to accept a $500,000 CD in bearer form being delivered by the Franklin National Bank and pay Franklin National Bank the sum of $500,000.

Thus, Woodruff at the Franklin National Bank thought he was being paid with Microthermal funds and Losurdo at the Bank of New York thought he was accepting a CD for his client, the Neuwirth Fund. Each bank received

what it should have received, the only deception being that in the mind of Woodruff, Franklin National Bank had purchased the CD for Microthermal. Woodruff then, at the request of Fisher, confirmed the issuance of the CD directly to Microthermal (Government Exhibit 18).

Woodruff testified that on June 10, 1970, he received a phone call from a person who had the same voice as the person who had previously made the phone calls to him using the name "Persky" (petitioner) requesting a second letter in the form which was eventually introduced as the June 10, 1970, letter (Government Exhibit 40). An individual representing himself to Woodruff as "Persky" (petitioner) did appear at Franklin National Bank and after objecting to the first form of the letter (Government Exhibit 39), requested and received a second form of June 10th letter.

After some argument and lack of identification of Persky (petitioner) by Woodruff, the government conceded (R. 1281) on the record that it was not petitioner who went to Franklin National Bank on June 10, 1970. Notwithstanding that concession, the government continued to contend that at least one of the two phone calls that Woodruff stated he received from "Persky" was actually made by petitioner and that petitioner made an additional phone call to Gilbert Losurdo at the Bank of New York (R. 1255-1256).

The Bill of Particulars requested information from the government specifying as to how much of the events leading to the issuance of the May 14 and June 10th letters were known to petitioner. The government specified that petitioner was not aware of the events in the indictment (summarized above), included in the indictment in paragraphs 3(f) (k)-(v) (A-26).

Although petitioner was acquitted on the conspiracy count, the phone calls became of critical importance since they were introduced in the testimony of two witnesses who had not engaged in "plea bargaining" with the government, and the jury would have been justified in giving great weight to their testimony, if positive voice identification of the caller who used the name "Persky" had been made.

The theory concerning admission was that if it were not petitioner it might have been someone who was part of the conspiracy (R. 4124a).

Petitioner's voice was unknown to Woodruff and Losurdo and no voice identification was attempted by the government.

The admission of the testimony relating to the alleged phone calls by petitioner was bitterly contested in the face of testimony by Fisher that accounted for all of the phone calls received by Woodruff and Losurdo. During these calls Fisher testified that he gave petitioner's name to Woodruff as counsel for Microthermal. Woodruff and Losurdo testified that they did not remember receiving any phone calls from Fisher (R. 1229, 1288, 1412) and it is and was petitioner's contention that all phone calls received by Woodruff and Losurdo were in fact made by Fisher.

Mathematically, the Fisher phone calls account for all of the calls received by Woodruff and Losurdo (the government conceded at R, 1281 that the individual who appeared at the Franklin National Bank on June 10, 1970 calling himself Persky was an impersonator).

The importance to the government's case of these phone conversations was made clear *ab initio* in the government's opening.

> "Persky calls the Bank of New York after the receipt by the Bank of New York and speaks to the man who actually runs Neuwirth's account, not Microthermal's account, a man named Losurdo, who will testify, and Persky calls and says, 'Please deliver the CD to me.' Losurdo says, 'Who are you?' Persky says, 'I am Microthermal.' The Bank of New York says, 'We don't have any Microthermal. We don't have any CD for you.'
>
> "*That is the crucial area.* Persky is told there is no CD for Microthermal." (R. 72, italics supplied.)

The importance of the jury considering these phone calls on the substantive count was that had petitioner made any of the phone calls they would have been evidence of knowledge on his part not attributable to the testimony of Galanis, Yamada or Plott that the assets of Microthermal had been dissipated by Yamada and Galanis and to that extent would have put petitioner on notice that would have ultimately led to "knowingly making or causing to be made" a false report.

The Court of Appeals disposed of the Woodruff telephone call testimony by holding "it was error for the court to have submitted the case to the jury on the alternative hypothesis that petitioner may have made the two calls" but further holding that it did not consider the "error to be sufficiently serious to warrant a new trial." The Court then went on to rely on a conspiracy theory to permit the evidence of the calls on the theory that the call was made by a co-conspirator (App. 24a).

On the question of the Losurdo phone call the Court of Appeals found it to be admissible on an "inference theory" (App. 25a) and bootstrap logic.

> "Finally, Galanis testified that after he learned of the call to Losurdo, he contacted Persky and berated him for calling the bank. Persky was silent during the reprimand, thereby strengthening the impression that it was he who made the call" (App. 25a).

Since petitioner denied receiving a call from Galanis relating to the Losurdo phone call the alleged silence following a conversation he denied took place was a slim reed for the Court of Appeals to accept as a way around the fact that the testimony of Fisher accounted for all of the calls to Losurdo (App. 25a).

Of particular significance is that notwithstanding the acquittal of petitioner by a jury on the conspiracy court the Court of Appeals, in order to support a coherent sequence of facts, accepted the heart of the alleged conspiracy, including the overt acts alleged, as "fact" insofar as they allegedly involved petitioner (App. 5a) in sustaining the conviction on the substantive count.

Thus, the evidence allowed in during this five and one-half week trial against petitioner under the umbrella of the conspiracy count on which petitioner was acquitted was so voluminous and poisonous as to positively preclude the jury and apparently even the Court of Appeals from objectively considering evidence presented against petitioner relating solely to the substantive count on which he was convicted. No amount of remedial instruction could have cured that error and the error was, in fact, aggravated by the Court's failure to instruct the jury to disregard the conspiracy evidence and the giving of an Allen Charge.

The jury commenced its deliberations on Monday afternoon, June 11, 1973. Late the following afternoon, Tuesday, June 12, 1973, after requesting and receiving certain exhibits and having a portion of the record read to them, the jury returned a verdict of acquittal as to petitioner and the two accountants on the conspiracy count relating to the filing of the Microthermal 10K Report and reported that they had not reached a verdict on Count Two, the substantive count relating to the filing of the Microthermal 10K Report (R, 4185).

The jury was then excused for the evening and on the following morning, Wednesday, June 13, 1973, a modified Allen Charge was delivered to the jury, but no instructions were given as to the necessity of the jury excluding from its consideration the mass of evidence admitted *only* on the conspiracy count (R, 4196 and 4198). Examples of hearsay admissible only on the conspiracy count, in addition to the phone call testimony, may be found at (R, 238a, 277-278, 287, 302, 343, 377, 693, 716, 1500, 1505, 1526, 1528, 1529-1532, 1535, 1539, 1813, 2086, 2091, 2092, 2100, 2137 2138, 2203 and 2328).

Subsequent to the Allen Charge, the jury retired and sent in the following note:

> "One juror feels that he/she would not be able to change his/her vote on Count 2 without also changing it on Count 1, which has already been unanimously decided and presented to the court. This juror feels that a change of vote on the one count necessitates a change in vote on the other. What then?" (R, 4194).

Petitioner's counsel again moved for a mistrial (R, 4195-4196).

Mr. Brodsky, the assistant United States Attorney, on behalf of the government, recognized and acknowledged the prejudicial evidentiary problem arising out of the verdict of acquittal on the conspiracy count and stated in part in response to the Court's question, "What does the government say?" (R, 4196):

> "* * * it seems to me that a *proper instruction at this time,* your Honor, *would be to instruct that juror that Count 2 must be considered on the basis of the evidence submitted on that Count*" (italics supplied) (R, 4196).

Mr. Brodsky did oppose the motion for a mistrial, conceding, however, that at most he considered the granting of that motion, "an error of judgment" * * * "not error amounting to error on appeal" (R, 4196).

Mr. O'Donnell, counsel of petitioner, again moved for a mistrial, setting forth in some detail his concern over the mass of evidence which would not have been admissible as to Count Two. He stated:

> "Your Honor, here we have a situation in which considerable evidence has gone before the jury and been admitted in evidence based upon the conspiracy count, declarations of alleged co-conspirators, evidence that would never, never have been admitted if the trial were solely with respect to Count 2. And now we are faced with a jury that has rendered its verdict with respect to the conspiracy count, and it seems to me not proper for the court now to urge this jury to reach a verdict on Count 2, which is a single, substantive charge against each of these defendants, and much of the evidence that is before this jury is not really admissible evidence as to that count.
>
> "And so, I therefore on that basis, ask your Honor to declare a mistrial." (R, 4198-4199).

The motion for a mistrial was denied (R. 4199 and 4201).

A note responsive to the juror's note was sent to the jury which read as follows:

> "In answer to the last note I must instruct the jury that it is too late to change any votes on which a verdict has been rendered. Count 1 has been decided, and no vote can be changed on that count. Counts 1 and 2 charge separate and distinct offenses. The jury should consider and decide Count 2 if the jurors can reach a unanimous agreement after taking into account all my instructions. Also, the jurors should consider and decide Counts 8 and 12.
>
> "And I have signed my name" (R. 4200-4201).

After further deliberation and examination of exhibits, the jury reported that it had a verdict of guilty on Count Two as to all defendants and remainded deadlocked on two perjury counts relating solely to one of the accountants (R. 4203, 4204).

In affirming the conviction of petitioner on the substantive count the Second Circuit made the following determinations:

(1) The hearsay and double hearsay evidence admitted against petitioner could remain before and be considered by the jury even after the acquittal on the conspiracy count (App. 14a-15a).

(2) The particular and novel sequence of events whereby the jury acquitted petitioner of the conspiracy charge on one day and, after an Allen Charge, found him guilty of the substantive offense on the following day did not bring this case within the ambit of *Sealfon v.*

United States 332 U. S. 575 (1948) and require an acquittal on the substantive count on the basis of *res judicata* or collateral estoppel by judgment.

(3) In the particular social and "Watergate" environment which existed in the spring of 1973 that the failure to ask the following, or substantially similar questions, on the *voire dire* did not constitute an abuse of discretion by the trial judge.

> "35. The defendant Robert S. Persky is an attorney and a member of the Bar of both the State and Federal Courts. Because of his position, would you hold him to a higher standard than you would any other citizen?
>
> "36. Has any juror had occasion to use the services of an attorney? (If so, please develop.)
>
> "37. Does any juror feel that attorneys by reason of the nature of their profession are inclined to be corrupt?
>
> "38. Do you feel that attorneys are less likely to tell the truth?"

Reasons for Granting the Writ.

1. The decision below in the Second Circuit is at variance with a decision on the same point by the Third Circuit and decisions of this court on analogous issues.

The Second Circuit's decision on the issue of the admissibility of hearsay evidence after an acquittal on a conspiracy count is in direct conflict with *United States v. Klosterman*, 248 F. 2d 191 (3d Cir. 1957).

Klosterman involved the prosecution of a taxpayer, his associate and a special internal revenue agent for bribery

and for conspiracy to bribe and defraud the United States. There was an acquittal on the conspiracy count and a conviction on the substantive count. The court said at page 195,

> "In discussing the convictions of Stafford and Klosterman, it must be borne in mind that they, as well as Deeney, were acquitted of the conspiracy charges *and so it follows that nothing Deeney told King could apply against Stafford or Klosterman.*" (Italics supplied.)

Prior to the instant case it appeared that the same rule would have been followed in the Second Circuit.

The sequence of events in the instant case differs only slightly from those in the trial before Judge Palmieri as reported in *United States v. Wolfson*, 437 F. 2d 862 (2d Cir. 1970). In *Wolfson* Judge Palmieri dismissed a portion of the conspiracy count at the end of the government's case. The trial in *Wolfson* occupied six weeks as opposed to the five and one-half weeks in the instant case.

Judge Moore stated at page 869:

> "* * * failure to advise the jury promptly and to instruct them to disregard four weeks of evidence relating to the stock purchases presents a more serious problem . . . Merely to instruct the jury at the end of the case and in the charge to disregard four weeks of proof directed to stock fraud was probably an exercise in futility exemplified by *Krulewitch* and *Delli Paoli* and finally resolved realistically by *Bruton*. In short, no matter what instructions were given, it is more than doubtful that the minds of the jury could be wiped as clean as a blackboard or slate."

Wolfson is applicable here in that, upon the jury's verdict of acquittal, a situation existed which was on all fours with what faced Judge Palmieri when he dismissed portions of the conspiracy count.

The prejudice to the petitioner was identical even though the sequences of events was slightly different. The poisonous hearsay and double hearsay reached and remained in the minds of the jurors.

In the instant case, not only were no supplemental instructions given, but *Wolfson* supports the proposition that had they been given, they would not have been able to accomplish their goal.

> "Whether instructions timely given would have enabled the jury to deliberate on the real questions ultimately posed by the Court . . . an appellate court will never know, but our developed concepts of a fair trial call for serious consideration of the likelihood of prejudice." *Wolfson, supra*, page 870.

In *United States v. Geaney*, 417 F. 2d 1116 (2d Cir. 1969), *cert. den.: Lynch v. U. S.*, 397 U. S. 1028, 90 St. Ct. 1276, 25 L. Ed. 2d 539 the Second Circuit said

> "* * * the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility * * * declare a mistrial if the defendant asks for it." Page 1120.

In its affirming decision the Court below attempted to distinguish *Wolfson* and ignored completely its own decision in *Geaney* and the Third Circuit's holding in *Klosterman*.

The grant of the writ sought herein will give this Court an opportunity to establish guidelines for the trial court's management of cases where the government has joined a conspiracy count with a substantive count. The need for these guidelines was anticipated as early as 1925 by Chief Justice Taft (see footnote 2 to *Krulewitch*, *infra*, at page 20).

Closely related to the point at issue are this Court's holdings in *Krulewitch v. United States*, 336 U. S. 440, (1949) and *Bruton v. United States* 391 U. S. 123 (1968)

Krulewitch involved the question of whether the erroneous admission of an alleged co-conspirator's statement required reversal or was merely cumulative evidence in a strong case and, therefore, "harmless error" under the then extant harmless error statute 28 U.S.C.A. 391. This Court said at page 444:

> "In *Kotteakos v. United States*, 328 U. S. 750, we said that error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict."

At page 445, this Court continued and concluded its reasoning with the following sentence:

> "We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner."

Mr. Justice Jackson concurring in the reversal and opinion in *Krulewitch* suggested that the government had itself to blame for the reversal because of its practice of joining a conspiracy count with a substantive count in

an attempt to gain the advantage of the extremely flexible rules of evidence pertaining to hearsay declarations in conspiracy cases.

> "The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto[2], suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice" (p. 445).

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[2]The Conference of Senior Circuit Judges, presided over by Chief Justice Taft, in 1925 reported:

"We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

"Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Annual Report of the Attorney General for 1925, pp. 5-6.

Fifteen years later Judge Learned Hand observed: "* * * so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." United States v. Falcone (CCA 2d N. Y.), 109 F. 2d 579, 581.

Mr. Justice Jackson further stated at page 453:

> "The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant. The hazard from loose application of rules of evidence is aggravated where the government institutes mass trials."

Bruton involved a joint trial of one Evans and Bruton on a charge of armed postal robbery. Evans did not testify, but a postal inspector testified to Evans' oral confession that Evans and Bruton had committed the robbery.

The court instructed the jury that although Evans' confession was competent evidence against Evans, it was inadmissible hearsay against Bruton and must be disregarded in determining Bruton's guilt or innocence.

The Court of Appeals for the Eighth Circuit affirmed Bruton's conviction because of the trial court's limiting instructions which were deemed adequate to excise the prejudicial evidence from the juror's minds.

This court reversed, holding that Bruton's right of cross examination was violated by the admission of the confession even in the face of the jury instruction to disregard the confession as to Bruton.

This court adopted the premise that corrective instructions as to evidence already before a jury do not afford protection to the defendant:

> "The fact of the matter is that too often such admontion against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of

> the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell."
>
> * * *
>
> "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds * * * To the same effect * * * is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch* * * * 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be an unmitigated fiction * * *'" *Bruton, supra,* page 129.

The grant of certiorari is accordingly appropriate not only to resolve the conflict between the Second Circuit, the Third Circuit and analogous decisions of this Court but also to provide guidance for trial court management of the large number of cases presently before the federal courts where a conspiracy count is joined with a substantive count.

2. The decision below is a departure from and in conflict with this court's decision in *Sealfon* v. *United States*, 332 U. S. 575 (1948).

In *Sealfon v. United States*, 332 U. S. 575 (1948), this court held that a prior acquittal on a conspiracy count alleging a conspiracy to present false invoices barred by reason of *res judicata* a subsequent conviction on a substantive count alleging the uttering of false invoices.

The sequence of events in the instant case, where an acquittal on the conspiracy count occurred on June 12, 1973, and the trial court rendered an Allen charge on the following morning, whereupon the jury again com-

menced deliberations and rendered a verdict of guilt on the substantive count on June 13, 1973, falls within the ambit of the reasoning of *Sealfon*.

In *Sealfon* two indictments were returned against the defendant therein. One indictment alleged a conspiracy to present false invoices and the second alleged the substantive count of uttering false invoices.

The conspiracy count was tried first and resulted in an acquittal.

After a trial and guilty verdict on the substantive count and an unsuccessful appeal a writ of certiorari was granted by this Court,

> "* * * because of the importance of the question to the administration of the criminal law" (page 578).

The Court said

> "* * * the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense" (page 578).

Although the Second Circuit held that this case did not fall within the ambit of *Sealfon* (App. 10a-11a) the "fact portion" of the Second's Circuit opinion is replete with its references to the alleged conspiracy

e. g.: "The serpentine course of the conspiracy was traced at trial largely through the testimony of Galanis and Yamada" (App. 7a).

and is demonstrative evidence that in order to find petitioner guilty the "conspiracy facts" had to be "reintroduced" after the acquittal on the conspiracy count.

The fact that the hearsay evidence remained before the jury and the language of the heart of conspiracy count was incorporated by reference in the substantive count brings the instant case closer to being squarely in point with *Sealfon* than any fact sequence reported in any case found by petitioner.

3. The limited scope of the *voir dire* sanctioned by the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this court's power of supervision.

Petitioner proposed that the court include in the *voir dire* a total of 56 questions of which approximately 20 were, in substance, asked of the panel. The trial judge, refused, in particular, to ask the following four questions which concerned attitudes towards and experiences with attorneys:

> "35. The defendant Robert S. Persky is an attorney and a member of the Bar of both the State and Federal Courts. Because of his position, would you hold him to a higher standard than you would any other citizen?
>
> "36. Has any juror had occasion to use the services of an attorney? (If so, please develop.)
>
> "37. Does any juror feel that attorneys by reason of the nature of their profession are inclined to be corrupt?
>
> "38. Do you feel that attorneys are less likely to tell the truth?"

Although it is conceded that the district court has broad discretion to control questioning of jurors, the questioning below did not give petitioner an opportunity

> "* * * (2) to determine the existence of actual bias or prejudice as a basis for excusing jurors for cause, and (3) to exercise peremptory challenges against those jurors thought to be hostile or unsympathetic." *8 Moore's Federal Practice* (Cipes Criminal Rules), §24.03 (2d ed. 1965).

Attorneys have always been a "class" in the minds of the public and were recipients of particularly adverse publicity at the time of the trial (May-June 1973) because of Watergate and the extensive coverage of Watergate in the press and on television.

One needs little reminder that literature abounds with derogatory statements regarding attorneys (e. g., the works of Charles Dickens) and that many members of the public regard their contact with attorneys to be on a par with visits to the dentist. See for example, Ben Franklin's "Dirty Pettifoggers," Vol. 59 *ABA Journal* 1165 (October 1973).

Events during the trial proved that at least one question refused by the court would have scored a bullseye in terms of actual bias or at least as a basis for a peremptory challenge had the juror's answer been known during the *voir dire*.

The proposed question was:

> "Has any juror had occasion to use the service of an attorney? (If so, please develop.)" (Q. 36.)

At R. 3417 it was revealed, purely by chance, that alternate juror #1 felt she had recently been mistreated by her lawyer during matrimonial litigation and requested information from the trial judge as how to make a complaint!

How others on the jury would have responded to the proposed questions will never be known but it is clear that Judge Learned Hand's observation that:

> "* * * we must spare no effort to secure an impartial panel" *United States v. Dennis*, 183 F. 2d 201, 226 (2d Cir. 1950), aff'd 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857 (1951),

was not even accorded lip service in the *voir dire*.

The attorney petitioner was prejudiced by trial court's refusal to include the requested questions in the *voir dire* and such prejudice was not "speculation" as characterized by the Court of Appeals (App. 16a) but substantive.

In view of what has been accepted practice in the federal trial courts on the *voir dire* as to questions relating to political orientation, publications read, education and socio-economic attitudes, petitioner's request for inclusion in the *voir dire* of four reasonable questions designed to elicit prejudice against attorneys should have been granted.

The denial of the request, contrary to the Court of Appeals' assertion that "the court surveyed the likely sources of bias" (App. 16a), resulted in the omission of a survey of a significant and material area of potential bias.

The omission was so far a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN LOGAN O'DONNELL,
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299 Park Avenue,
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June 20, 1974.

OPINION BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 560, 561—September Term, 1973.

(Argued December 14, 1973 Decided April 1, 1974.)

Docket Nos. 73-2401, 73-2450

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

PHILIP ZANE, JEROME E. SILVERMAN, ROBERT S. PERSKY,

Defendants-Appellants,

—and—

MORTON S. KAPLAN, CHARLES FISCHER, RAMON N. D'ONOFRIO, and U.S. SECRETARIAL INSTITUTE, LTD.,

Defendants.

Before:

LUMBARD and MANSFIELD, *Circuit Judges*, and GURFEIN, *District Judge.**

Appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, for filing a false Annual Report (10K) with the Securities and Exchange Commission.

Affirmed.

* Of the United States District Court for the Southern District of New York, sitting by designation.

SANDOR FRANKEL, Esq., New York (Louis Bender, Esq., New York, N.Y., of counsel), *for Appellants Zane and Silverman.*

JOHN L. O'DONNELL, Esq., New York, N.Y. (Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N.Y., of counsel), *for Appellant Persky.*

JAMES E. NESLAND, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, John D. Gordan III, Assistant United States Attorney, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Upon this appeal we have been required to review the 4300-page record of a five-week jury trial, which resulted in the conviction of a lawyer and two accountants for filing a false Form 10K Annual Report with the Securities and Exchange Commission ("SEC"), 15 U.S.C. §§78o and 78ff, to determine whether there is merit to any of the numerous claims of error asserted by appellants. The multi-count indictment under which appellants were tried charged first that they, along with two other defendants, conspired to file the false Annual Report for Microthermal Applications, Inc. ("Microthermal") with the SEC (Count 1); second, that appellants actually filed the false report with the SEC (Count 2); and third, that appellants Zane and Silverman obstructed the SEC's investigation into the filing of the false report (Count 3). The remaining counts, 6-12, charged that Zane perjured himself before the SEC during its investigation.[1] On June 12, 1973, the jury ren-

1 Counts Four and Five were severed from the trial at the instance of Zane and Silverman.

dered not-guilty verdicts on Counts One, Three, Six, Seven, Nine, Ten and Eleven. After a supplemental charge and further deliberation, the jury on June 13, returned a guilty verdict on Count Two, the substantive offense, and reported itself unable to agree on the remaining counts, Eight and Twelve. Appellants were each sentenced to a two-year split sentence (four months to be served and the balance suspended) on the basis of their conviction on Count Two. After considering the many points raised on this appeal, we find none that warrants a reversal.

The action in this Byzantine plot began in 1969 when the organizers of Microthermal, a new publicly held venture with no operating history whose shares were traded on the OTC market, raised $800,000 from a public offering of its stock in July of that year. The prospectus indicated to the investors that at least $300,000 of the proceeds would be invested in relatively safe securities such as certificates of deposit, government bonds or other interest-bearing obligations. Morton Kaplan, president of Microthermal, had other plans in mind for these monies. Between October of 1969 and January of 1970 he made cloaked transfers of $480,000 of the newly raised funds to Peter Galanis and Akiyoshi Yamada, principal operators of a hedge fund known as Takara Partners, of which they were members.

No sooner had Kaplan completed these transfers as a loan in violation of the prospectus than he set about concealing that fact. After the first transfer in October, 1969, Robert Persky, secretary of Microthermal and partner in the law firm that acted as general counsel to Microthermal, drafted a contract that showed $240,000 of the $480,000 to have been invested in securities of the Delanair Corporation, which Takara Partners held in their portfolio. The purpose of this contract, according to Yamada, was to conceal the real nature of the transaction, which was to infuse money into Takara, a cash-poor company. In Janu-

ary, 1970, Kaplan transferred another $240,000 of Microthermal's money to Takara Partners, this time to bail out a personal investment he and Persky had made in the hedge fund.[2] This misuse of Microthermal's funds might never have been discovered if Takara Partners had been able to repay them. But repayment became impossible because the funds were dissipated, in this case through the purchase by Galanis and Yamada of high risk securities.

The moment of truth, when Microthermal would first face the necessity of disclosing the loss, loomed on the horizon as the time for filing Microthermal's Form 10K Annual Report with the SEC approached. (Microthermal's fiscal year ended on January 31, 1970.) That Report, which was due on May 31, 1970, required Microthermal to set forth the interest-bearing obligations in which it had presumably invested the $480,000, bearing the usual certificate of a certified public accountant to the effect that the statement reflected its audit made in accordance with generally accepted auditing standards and accounting principles. To satisfy this requirement Microthermal faced an audit by its accounting firm, Arthur Andersen & Co., which it was feared would not attach its certificate to the Report unless and until it was shown the securities representing the investment or other satisfactory evidence of Microthermal's ownership of them. Faced with this crisis, which was directly attributable to their own fraud, Kaplan and Persky sought to enhance their prospects of success in concealing the misappropriation of the funds by replacing Arthur Andersen & Co. with a firm that could be more "flexible" in its approach than generally accepted auditing standards

2 Kaplan and Persky had together invested some $200,000 of their personal fortune in Takara Partners in a 90-day "put." When it became apparent that Takara Partners' cash flow was little more than a trickle, Galanis prevailed upon Kaplan to transfer another $240,000 of Microthermal's funds to Takara Partners to be used to repay Kaplan's and Persky's personal investment.

and accounting principles would permit. They found such a firm in the persons of Philip Zane and Jerome Silverman. Over a series of meetings with Kaplan, Persky, Galanis and Yamada, the two accountants were introduced to the plot. They were asked to certify the existence of a certificate of deposit for the $480,000. Galanis for his part agreed to generate some documentation for the purported certificate.

Galanis proceeded to weave a tangled web of falsity. He enlisted the services of one Richard Kirschbaum who, in turn, approached Charles Fischer as a person who might be of assistance in creating evidence of a certificate of deposit which did not in fact exist. Fischer advised that it was impossible to borrow a certificate of deposit. However, he came up with a scheme that was to lead to the indictment in this case. In a nutshell this scheme was to purchase a certificate in Microthermal's name, obtain a letter from the seller confirming the purchase, and simultaneously sell the certificate to a third party, which would make immediate payment to the seller. If successful the plan would enable Microthermal to produce a letter from the seller confirming the sale to it, even though the sale would actually have been made to the third party. For such a plot expert timing, knowledge of the market, and acquaintanceship with the traders in it were essential. First Fischer called the Franklin National Bank on May 14, 1970, and under the name of Microthermal ordered a 90-day certificate of deposit (bearer form) for $500,000 to be delivered against payment at the Bank of New York. Meanwhile Fischer had convinced a friend and officer of the Neuwirth Fund, whose custodian bank was the Bank of New York, that he had a $500,000 certificate of deposit drawn on the Franklin National Bank for sale at a premium over the prevailing rate for such certificates. The officer of the Neuwirth Fund directed the Bank of New

York to purchase the certificate for the Fund's account. Pursuant to Fischer's instructions the Franklin National Bank issued the certificate of deposit and delivered it to the Bank of New York. Upon the Neuwirth Fund's instruction the Bank of New York paid for the certificate and entered it in the Fund's account.

The Franklin National Bank all the while assumed that it had issued the bearer certificate to Microthermal as the purchaser. Indeed, Frank S. Woodruff, an officer of that bank, had written to Kaplan to confirm the purchase of the certificate for Kaplan's account at the Bank of New York. By letter dated May 18, 1970, Kaplan instructed the Bank of New York to deliver the $500,000 certificate to Persky's office. Understandably, the receipt of this letter was marked by some confusion at the Bank of New York where the only certificate in that amount had been purchased for the Neuwirth Fund, not for Microthermal. Gilbert Losurdo, the officer at the Bank of New York handling this certificate, spoke by phone with a man who represented himself to be Robert Persky and who again asked that the certificate be delivered to him. (At this point Persky, like Kaplan before him, apparently believed that a fraudulent certificate had actually been issued in Microthermal's name.) After hearing of the telephone call Galanis instructed Persky that the certificate was not held for Microthermal and that he should make no further calls to the bank that might upset their scheme.

Zane and Silverman played no role in procuring the certificate and the false documentation. But at a meeting after the certificate switch, which was attended by all the principals, the accountants' problem was discussed. At length it was decided that Zane and Silverman would certify the existence of the certificate of deposit on the basis of a letter from the Franklin National Bank to the effect that a $500,000 certificate of deposit had been issued

to Microthermal. At the same time it was agreed that Zane and Silverman's fee for the audit, previously set at $6,000, would be increased by $5,000. The earlier letter sent by the Franklin National Bank to Kaplan was considered inadequate because it suggested that the certificate had been issued to Kaplan's personal account rather than to Microthermal. A new letter was sought. On June 10 the Franklin National Bank sent another letter which contained the same flawed language as the original. A second letter on June 10 corrected the problem by stating that the certificate had been issued for the account of Microthermal. On the basis of this second letter Zane and Silverman certified that a certificate of deposit had existed for Microthermal as of January 31, 1970. The Form 10K Annual Report filed with the SEC thus included the certified financial statements showing Microthermal's cash and cash items as $525,024 when in fact at least $500,000 of this cash did not exist in any form.

The serpentine course of the conspiracy was traced at trial largely through the testimony of Galanis and Yamada. The two stood accused of a series of other fraud and tax offenses and it can be supposed that it was more than a trace of self-interest that led them to cooperate with the government. The government also introduced testimony that Zane and Silverman's work papers were wholly inadequate to certify the existence of the certificate of deposit and the funds underlying that certificate. Zane and Silverman never attempted, for example, to verify whether Microthermal had an account at the Bank of New York or held a certificate there in its name. Their work papers did make an implausible attempt to cover the period from October 1969 through May 1970, when the Franklin National Bank certificate was supposed to have been issued to Microthermal, by showing several certificates of deposit as hav-

ing been issued in October and January with maturity dates on May 14, 1970. There is, however, no evidence of any of these earlier certificates; indeed, Microthermal's books reflect neither their issuance nor their rollover at maturity on May 14. Furthermore, Silverman and Zane show these certificates as earning 6.75% interest though a government witness testified that during the relevant period banks were prohibited from paying any more than 6.25% interest on such certificates. Against these proofs Persky, Zane and Silverman offered only the defense that they believed in the existence of the $500,000 certificate of deposit and in the truth of the second Franklin National letter issued on June 10, 1970.

After deliberating for almost two days the jury acquitted all the appellants on Count One, the conspiracy charge; appellants Zane and Silverman on Count Three, charging the obstruction of the SEC investigation; and appellant Zane on various counts charging him with perjury before the SEC. The next morning the judge delivered a modified Allen charge to the jury. After further deliberation the jury returned a guilty verdict against all the appellants on Count Two, the substantive count which charged that they actually filed the false report with the SEC.

Issues Raised by All Appellants

The first question to be considered is whether the jury's not-guilty verdict with respect to Count One (conspiracy to file the false Form 10K Annual Report) barred it from later entering a separate verdict of guilty with respect to Count Two (substantive offense of filing the false Form 10K Annual Report itself). The jury returned a partial verdict acquitting appellants on several counts, including Count One, and retired for the night without having rendered a verdict on Counts Two, Eight and Twelve. On

the following morning the jury, after receiving a modified Allen charge from the court, retired for further deliberations. Shortly it sent a note to the judge indicating that one juror felt that he could not change his vote on Count Two without changing his vote on Count One. At this point counsel for the appellants moved for a mistrial. The court denied the motion and instructed the jury that it was too late to change on Count One (as to which a verdict had been entered), that Counts One and Two were separate and distinct offenses and that the jury should consider Count Two. Zane and Silverman objected to this instruction. Indeed, immediately after the partial verdict of acquittal they had moved that the remaining counts be dismissed since there was no rational way—as far as they were concerned—that the jury could return any verdict but not guilty on the other counts. They argued that the two counts were virtually identical and that since the jury had found no agreement to file the false Annual Report as alleged in Count One it could not find that appellants aided and abetted the filing of the report as charged in Count Two. The jury, however, after further deliberation, returned a guilty verdict on the substantive offense.

In a supplemental brief received after the argument appellants urge that the verdict of not guilty on the conspiracy count must act as a bar to the later verdict of guilty on the substantive count. The government has replied that the problem is really just a variation on a familiar theme for which there is an authoritative and well-settled answer: that the courts will not speculate on inconsistent verdicts and that a jury's determination on one count in an indictment has no estoppel effect on its determination on other counts at the same trial. *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967). However, appellants correctly point out that the

particular sequence in this case is novel. In the usual case the inconsistent verdicts are simultaneously returned; here the verdicts were separated by further deliberations. Appellants argue that this temporal factor distinguishes this case from the traditional rule and brings it closer to *Sealfon* v. *United States*, 332 U.S. 575 (1948), where the Court applied the principle of res judicata to bar a subsequent prosecution on a substantive offense after an acquittal on a related conspiracy count, than to *Dunn* v. *United States*, 284 U.S. 390 (1932), where the Court declined to upset inconsistent verdicts simultaneously rendered in the same trial. We think not.

It is well settled that even plainly inconsistent jury verdicts, simultaneously rendered are the jury's prerogative. The rule, as announced by Judge Learned Hand in *Steckler* v. *United States*, 7 F.2d 59 (2d Cir. 1925), and confirmed by Justice Holmes in *Dunn* v. *United States*, 284 U.S. 390 (1932), is that consistency in jury verdicts is not required. That the rule retains all its vitality today is evident from our steadfast adherence to it. See, e.g., *United States* v. *Handel*, 464 F.2d 679 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972); *United States* v. *Catalano*, 439 F.2d 1100 (2d Cir.), *cert. denied*, 404 U.S. 825 (1971); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967); *United States* v. *Magnus*, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967).[3]

It is equally clear that the principle of res judicata recognized in *Sealfon* v. *United States* in the setting of *separate* prosecutions has no application to the inconsistent

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3 To be sure, this court has declined to extend to judges the same prerogative in returning inconsistent verdicts that juries have historically enjoyed. *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960). But at the same time this court has made it clear that nothing said in *Maybury* reflects upon the continuing force of the *Dunn* rule. *United States* v. *Carbone*, *supra*.

verdicts on counts tried together under a single indictment. *United States* v. *King*, 373 F.2d 813 (2d Cir.), *cert. denied*, 389 U.S. 881 (1967); *United States* v. *Marcone*, 275 F.2d 205 (2d Cir.), *cert. denied*, 362 U.S. 963 (1960).

Appellants argue that the rule, which recognizes that compromise or an indication of leniency may underlie apparently inconsistent verdicts, should not apply here because no such considerations could have played a part in the jury's verdicts in the present case, since it reached a final verdict as to Count One, which it rendered before its further deliberation and verdict as to Count Two. However, the rule against disturbing inconsistent verdicts runs deeper than the principle of compromise. The validity accorded to such verdicts recognizes the sanctity of the jury's deliberations and the strong policy against probing into its logic or reasoning, which would open the door to interminable speculation. It is still possible, for instance, that because of the multiple counts with which it was confronted the jury, recognizing that it might still find appellants guilty on Count Two, decided to forego a possible guilty verdict on Count One as a means of "using its power to prevent the punishment from getting too far out of line with the crime," *United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir. 1960), and that after a night's sleep the thought of possible inconsistency first occurred to one juror. To this we might add the further possibility that the jurors, because of the inherently prolix nature of instructions as to the law of conspiracy, which have become increasingly complicated and intricate over the years, may have misapprehended some aspect of that crime.[4] The burdens im-

4 With the aid of hindsight we think that Judge Wyatt would have been better advised, in response to the jury's note indicating one juror's doubt as to whether he could consistently render different verdicts on Counts One and Two, to have instructed the jury again as to the elements of the second count, since the jury's recollection of the charge, after two days' deliberations, may well have faded.

posed by the conspiracy charge have repeatedly been underscored by leading lights of the judiciary. *Krulewitch* v. *United States*, 336 U.S. 440, 445-58 (1949) (Jackson, *J.*, concurring); *United States* v. *Bufalino*, 285 F.2d 408, 417 (2d Cir. 1960) (Lumbard, *C.J.*); *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand, *J.*), *aff'd.*, 311 U.S. 205 (1940); *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (L. Hand, *J.*). Although further examples of conjecture as to the jury's mental gymnastics are possible, the danger inherent in such endless surmise, absent a set of specific and detailed findings of fact, is readily apparent. Faced with this prospect we have long since opted in favor of according controlling weight to the jury's prerogative.

In any event the return of a not-guilty verdict on a conspiracy count does not ipso facto constitute a bar to conviction on the underlying substantive offense even when there are separate prosecutions for the two offenses.[5] An acquittal on a conspiracy count would bar conviction on a substantive count only if it constituted a "determination favorable to the petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial." *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948). Applying these standards, the inconsistency in the jury's verdicts in the present case is more apparent than real. A careful reading of the indictment and the charge to the jury indicates that the jury could have acquitted the appellants on the con-

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5 The courts have applied the principles of *res judicata* in appropriate instances as when the verdict of acquittal in a conspiracy trial constituted a necessary "determination favorable to petitioner of the facts essential to conviction of the substantive offense." *Sealfon* v. *United States*, 332 U.S. 575, 578-79 (1948); *United States* v. *Kramer*, 289 F.2d 909 (1961).

spiracy charge as alleged and consistently have convicted them on the substantive count. The acquittal was not necessarily a finding that there was no conspiracy or joint criminal venture, but only that the government had failed to prove the specific conspiracy alleged in Count One. The indictment specifically alleged three overt acts in furtherance of the conspiracy. The district court, in a rather restrictive instruction to the jury, advised them that they must find one of these three acts in order to convict on the conspiracy charge. In view of this charge the jury, though convinced that a conspiracy existed, may have entertained a reasonable doubt that any of the three specified acts occurred as alleged. This finding would not have prevented it from concluding on the basis of the other evidence that the appellants had actually committed the substantive offense. Indeed, the jury was permitted to reject any version of the conspiracy and still find that the appellants as individuals had committed the substantive offense.[6] For instance it could have based its verdict on a finding that each of the appellants was aware of the false nature of the report and nonetheless lent his name to the filing. For the foregoing reasons we decline to overturn the jury's finding of guilt on Count Two.

Closely related to the claim of alleged inconsistency in the verdicts are several subsidiary points raised by appellants. They argue that the court's charge immediately before the jury retired to consider Count Two and its supplemental instruction given during the second deliberation were prejudicial. They maintain that the charge affirma-

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6 The statute under which the appellants were convicted reads in pertinent part: ". . . any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter . . . , which statement was false or misleading with respect to any material fact, . . . shall upon conviction. . . ." 15 U.S.C. §78ff(a) (1970).

tively encouraged the jury to return an inconsistent verdict on Count Two. Our finding that the verdicts were not necessarily inconsistent disposes of this argument. We think it appropriate to add, however, that at trial counsel for Zane and Silverman remarked with reference to the judge's modified Allen charge that it was "the fairest" Allen charge that he had ever heard. Whatever the potential of the standard Allen charge for promoting conviction—and we have repeatedly affirmed the district court's use of the charge in appropriate circumstances, see *United States* v. *Tyers*, 487 F.2d 828 (2d Cir. 1973); *United States* v. *Jennings*, 471 F.2d 1310, 1313-14 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973)— it was surely absent from the modified charge given by the judge here.

Appellants contend that it was error for the court, after its r[illegible]t of a note from the jury indicating that one of the jurors apparently thought that the two counts charged the same offense, to instruct the jury that Counts One and Two charged separate and distinct offenses. It is hornbook law that conspiracy and its underlying substantive offense are separate and distinct and can be charged as such. *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Appellants' real complaint is not as to what the court said, as much as it is to what the court failed to say. Appellants asked the court to rule that the hearsay evidence admitted on the conspiracy count should not be considered on the substantive count. Their theory is that the jury, having rejected the conspiracy count, should not be free, in their deliberations on the substantive count, to consider evidence admitted because of the conspiracy count. The argument fails in at least two respects.

First, the hearsay evidence was admissible from the very outset on both the conspiracy and the substantive counts. Once the court is satisfied by a fair preponderance of inde-

pendent evidence as to the existence of a joint criminal undertaking, ordinary agency principles permit hearsay statements of a colleague in furtherance of that enterprise to be admitted on a substantive count that is unaccompanied by any conspiracy count. See *United States* v. *Rinaldi*, 393 F.2d 97, 99 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968); *United States* v. *Messina*, 388 F.2d 393, 395 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968); *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967); *United States* v. *Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). This result is not changed by the inclusion of a conspiracy count or by the jury's acquittal on that conspiracy count. See *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945).

Second, the question of the admissibility of hearsay evidence on the substantive and the conspiracy counts was for the judge alone to decide. That determination of admissibility is not altered because the jury later decides to acquit on either of the counts. *United States* v. *Pugliese*, *supra*. Nothing said in *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970), is to the contrary. There the cause for concern arose from the fact that the hearsay evidence was not admissible on the remaining counts of perjury and obstruction of justice. No such situation exists here: the hearsay evidence was admissible against appellants on both counts.

The next point raised by all appellants concerns the district court's voir dire. They allege that the court did not go far enough in its attempt to ferret out latent biases among the jurors when it refused to pose several questions propounded by appellants with respect to possible investment losses attributable to fraud or manipulation. In considering the issue we are bound by the accepted principle

that the trial judge enjoys wide discretion in conducting the voir dire. See, e.g., *United States* v. *Dennis*, 183 F.2d 201, 226-28 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951). Here the district court more than met its responsibilities in this respect. Judge Wyatt acquainted the jury with the substance of each of the counts of the indictment, including the charge of filing of a false financial report on behalf of Microthermal with the SEC. He identified each appellant by name and profession and named the principal brokerage firms and companies that might figure in the case. Thus each juror should have been able to determine whether there was anything about the case generally that would make it difficult for that juror to serve impartially. The court's questions, of both a broad and narrow gauge, including whether the jurors had been the victims of a crime or involved in controversies with the SEC, were adequately calculated to plumb potential sources of prejudice. On the basis of the voir dire at least three prospective jurors asked to be excused, one because he had suffered losses at the hands of stock manipulators. The court's questions had obviously brought to the jurors' minds the same range of considerations as appellants sought through their proposed questions. Of course there is always the possibility that the consciences of other jurors might have been pricked and still further-flung potential sources of bias detected through an infinite regression of questioning or through the fortuitous wording of a particular question. But no system of justice can wait upon such adventitious occurrences. Wide discretion must be vested in the trial judge with respect to scope of the inquiry. Speculation will not suffice to overturn a voir dire when, as here, the court surveyed the likely sources of bias and prompted the jurors with evident success to consider for themselves what other sources of potential bias there might be. See *United States*

v. *Colabella*, 448 F.2d 1299, 1302-03 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972).

All the appellants object to the admission during the trial of the testimony of Lester Green, an SEC attorney who had worked on its Microthermal investigation. On cross-examination Persky, who testified in his own defense, was asked whether he had during an earlier interview with the SEC acknowledged that he had felt "uneasy" about the purported certificate of deposit in May and June of 1970. Persky denied having made such a statement. The government then called Lester Green, a participant in the SEC interview, to give contradictory testimony as to the statements made on this subject of uneasiness by Persky at the interview. Persky now maintains that this rebuttal testimony should not have been permitted because the meeting with the SEC was intended as a bargaining or settlement session.[7] Forewarned of the alleged purpose of the meeting, the trial judge had ruled that Green could testify only as to Persky's statements and not as to the nature or purpose of the meeting. Any potential for prejudice to Persky was thus eliminated by the court's ruling. Persky's further objection that by allowing Green to testify regarding his admissions made at an attempted "settlement" of the case against him the court somehow or other involved itself in a violation of the Code of Professional Responsibility, EC5-9, DR5-101, is not supported by the cited text of that Code or by opinions issued with respect to it. Indeed it would be a rather extraordinary interpretation that would enable a witness to testify to one version of the facts without risking confrontation with a prior contradictory statement, whether or not given to the prosecutor at an un-

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7 The government disputes this characterization of the meeting, noting that it occurred before the indictment was filed and that Persky was advised of his *Miranda* rights at the beginning of the meeting.

successful plea bargaining session. There is no evidence that Persky's prior statement to the prosecutor was made "without prejudice" and it is doubtful, had such a condition been imposed, that the prosecutor would have continued with the session. In any event Green, although an SEC attorney, was not the prosecutor. Appellants' further contention that Green should not have been permitted to testify because he sat with government counsel throughout the trial is fully met by the settled rule permitting a government investigator, which was Green's function in this case, to do so. See *United States* v. *Infanzon*, 235 F.2d 318, 319 (2d Cir. 1956).

Zane and Silverman raise a more substantial objection to Green's testimony, based on their request for permission to cross-examine Green on the purpose of Persky's meeting with the SEC. The judge not only denied the request but denied Zane and Silverman any cross-examination of Green on the ground that Green's testimony was admitted against Persky only and not against them. Zane and Silverman argue that this ruling denied them their rights under *Bruton* v. *United States*, 391 U.S. 123 (1968). The *Bruton* point need not detain us. Persky himself testified and was subject to cross-examination by Zane and Silverman. The right of confrontation with the declarant was thus never in question. See *Nelson* v. *O'Neil*, 402 U.S. 622, 629-30 (1971).

Zane and Silverman further contend, however, that the ruling denied them their general right to cross-examine a witness. The court, concerned with the possibility that they might attempt to get into the purpose of the meeting with the prosecutor, which it had ruled "off limits," relied on its instruction to the jury that Green's testimony was to be considered against Persky only. If this ruling were crucial we might doubt its soundness as a general principle, since

the "rub-off" effect of testimony against a co-defendant may sometimes prejudice a defendant, despite an instruction that it is not to be considered against him, see *Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, *J.*, concurring); *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947). Furthermore, we fail to detect any impropriety in permitting such cross-examination, subject to whatever limitations are demanded by basic rules of evidence. We need not cross that Rubicon in this case, since nothing in Persky's statements as recounted by Green could have prejudiced Zane and Silverman. Green's very brief testimony regarding Persky's statements to the government regarding the June 10, 1970, meeting attended by himself, Kaplan, Silverman, Zane and Galanis tracked what Persky had testified to at trial, except for the reference to his "uneasy" feeling, which of course incriminated Persky, not Zane or Silverman, and except for Green's failure to quote Persky as placing Zane at the June 10 meeting, which if anything was helpful to Zane. Silverman's contention that Green's account of Persky's earlier statement indicated that Silverman knew of the first June 10 letter from the Franklin National Bank[8] is not borne out by the record. Persky merely told Green that he had seen the first June 10 letter during a meeting on June 10 which Silverman also attended,[9] but Persky did not suggest that Silverman saw

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8 The first letter of June 10 suggested that a certificate of deposit had been issued to the personal account of Morton Kaplan. This was not considered adequate documentation upon which to certify the existence of a certificate of deposit in Microthermal's name. Hence the Franklin National Bank was asked to draft a second letter on June 10 showing the certificate as having been issued to Microthermal. Zane and Silverman denied having seen the first June 10 letter. The discrepancy between the two letters would normally have obligated them to do more checking than they actually did concerning the certificate.

9 Persky had himself on direct examination testified to the details of the June 10 meeting, including the facts that he saw the first letter at that meeting and that Silverman was present at the meeting.

the letter. Because we find nothing in the statements attributed by Green to Persky that the jury might—in disregard of the court's instruction—have applied against Zane and Silverman, we conclude that they were not prejudiced by their inability to cross-examine Lester Green.

Appellants' bevy of objections to various other evidentiary rulings made by the court in the exercise of its discretion are likewise found to be without merit. Persky contends, for example, that despite the fact that Galanis' testimony covers some 772 pages of the trial transcript, of which 518 pages were devoted to cross-examination, the court improperly restricted his cross-examination of Peter Galanis on the subject of criminal charges pending against Galanis in Canada which alleged that he defrauded others there. The subject of these criminal charges and of the understanding Galanis had with the government concerning his cooperation in this trial, which was relevant to the witness' possible bias in favor of the government, was adequately explored and developed. The court acted well within its discretion, having in mind the length of the trial and the subordinate nature of the inquiry, in denying Persky's request to embroider upon the topic by reading the Canadian charges to the jury. See, e.g., *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954).

Zane and Silverman mount a more sustained attack upon the court's rulings on cross-examination. They object first to the court's curtailment of their examination of Galanis after Galanis admitted to having deceived other accounting firms concerning the assets of Takara Partners. Galanis had testified specifically that he had deceived the accounting firm of Laventhol, Krekstan, Horwath & Horwath, which certified a financial statement falsely representing Takara's assets to be $3.2 million, by submitting false statements and documents to the firm and that he

had made substantial payments to the firm in the hope that the firm would take a liberal view of the audit of Takara Partners. The court acted well within its discretion in refusing to permit Zane and Silverman to pursue the point still further. They had sufficient testimony to argue to the jury, as they did in summation, that Galanis had simply deceived them in the same way he had deceived other accountants.

Zane and Silverman also assert that their cross-examination of Galanis was impaired by the court's refusal to treat statements made by Galanis to his probation officer as Jencks Act material (18 U.S.C. §3500). The defense sought to establish that Galanis' statements to his probation officer were inconsistent with the testimony he was offering at trial. Because the court deemed statements made to a probation officer to be privileged, it declined to order their release to the defense. However, we need not decide this point, for our own examination of Galanis' statements to his probation officer reveals that the statements are consistent with his testimony at trial and that they do not contain any exculpatory material.

Appellants Zane and Silverman further complain of a restriction that was placed upon their cross-examination of Yamada, whose testimony covers 416 pages of the trial transcript, of which almost 200 pages reflect cross-examination. The restriction related to testimony on Count Four, which had been severed from the present case at the request of Zane and Silverman. The count dealt with the purported transfer of the $500,000 certificate of deposit from Takara Partners to a third-party on November 20, 1970, three months after the main conspiracy had been consummated. In his testimony before the SEC Yamada had said that he believed in November 1970 that the certificate of deposit existed. Indeed, there was a letter of November 20, 1970, signed by Yamada in which he ac-

knowledged delivery of the certificate of deposit. At the present trial Yamada freely admitted that his testimony before the SEC was perjurious and that he knew that the certificate did not exist. Zane and Silverman attempted to persuade the jury to the contrary. They argued that Yamada was perjuring himself at trial and had been telling the truth about the certificate at the SEC hearing. To bolster this argument Zane and Silverman sought to introduce Yamada's letter of November 20, 1970. The government objected on the ground that the letter would bring the court into what was now a collateral matter, the transactions behind Count Four.

Had we been exercising a trial judge's discretion in the matter we probably would have admitted the letter as tangible impeaching evidence tending to support the argument that Yamada may have been testifying truthfully regarding the certificate before the SEC and lying at trial. On the other hand the letter was collateral in that expressions of Yamada's belief in November 1970, even if truthful—and of course Yamada contends that his SEC testimony was false—would not necessarily have served to impeach his trial testimony relating to his beliefs in May and June of 1970. More importantly, the government maintains—and Yamada would undoubtedly testify—that the November letter was itself part of a continuing sham. If, as appellants urge, Yamada in fact believed that the certificates existed in the Spring of 1970, his motive in denying such belief would be something of a mystery. Moreover, if evidence of the letter had been admitted at trial, the government would have sought to prove that the November transaction, which had been severed as a charge, was a sham, as were the statements in the November letter. Under the circumstances we are governed by the principle that limiting such potential excursions into collateral matters is something best left to the discretion of the trial

judge. See, e.g., *United States* v. *Kahn*, 472 F.2d 272, 279-80 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Applying that principle here we cannot say that Judge Wyatt abused his discretion. In the five-week trial, marked by extensive cross-examination of Yamada, his credibility was thoroughly explored by counsel of recognized competence.

ISSUES RAISED BY APPELLANTS INDIVIDUALLY

Persky

Persky alleges that it was error to admit as evidence against him two phone conversations in mid-May with an officer of the Franklin National Bank (Frank Woodruff) and one such conversation thereafter with an officer of the Bank of New York (Gilbert Losurdo) to all of which, according to the testimony of the bank officers, a person representing himself to be Robert Persky was a party. As for the calls to the Franklin National Bank, Woodruff testified that after receiving a telephone inquiry in the first conversation (May 13) regarding the rate for a 90-day certificate of deposit, he received instructions in the second call (May 14) to deliver a 90-day $500,000 bearer certificate to the Bank of New York and to send a confirmation to Morton Kaplan, c/o Microthermal.

Persky maintains that there was no proof that it was he who actually made the calls and indeed argues that one of the alleged co-conspirators, Fischer, accounted for all the calls to the banks. Fischer, a severed co-defendant and alleged co-conspirator, testified that at the instance of Richard Kirschbaum, a friend of Yamada and Galanis, he made the calls to Woodruff, representing only that he was calling on behalf of Microthermal and providing basic information as to the order for the certificate, the name and address of Microthermal, Persky's name and his firm address and the name of Kaplan.

The court admitted the evidence of the calls on alternative theories: that the jury might on the basis of circumstantial evidence find that Persky had actually made the calls, or that the jury might find that the calls were made by some other co-conspirator. If the court, in light of Fischer's testimony, had admitted proof of the calls to Woodruff solely on the ground that those calls were made by a co-conspirator, there would have been no error. The calls were an integral part of the alleged conspiracy and as acts in furtherance of that conspiracy were admissible against Persky even if it was a co-conspirator who actually made them. *Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946). Persky's objection, however, is to that part of the instruction that permitted the jury to find that Persky himself had made the calls.

Although there was some circumstantial evidence (e.g., Woodruff's contemporary notes containing Persky's phone number) from which the jury might have inferred that Persky made the calls to Woodruff, it was weak. The more likely possibility appears to be that Fischer made the calls and that he either represented himself to be Persky or, because he gave Persky's name and firm, led Woodruff to believe he was talking with Persky. Under the circumstances it was error for the court to have submitted the case to the jury on the alternative hypothesis that Persky may have made the two calls. However, we do not consider the error to be sufficiently serious to warrant a new trial. There was ample independent proof of a conspiracy to which Persky was a party. The evidence of the calls was clearly admissible on the theory that the call was made by a co-conspirator. The court specifically noted to the jury that the bank officers could not identify the caller's voice. Persky testified that he did not make the calls. The government did not contend to the jury in summation

that Persky had made the calls to Woodruff. In the face of very substantial proof of Persky's involvement in the alleged fraudulent scheme we believe that the submission of this admissible evidence on alternate theories could not have misled the jury.

Losurdo's testimony as to the purported Persky call to him stands on a different footing. There was ample circumstantial evidence that Persky did make the call to Gilbert Losurdo, in which the individual identifying himself as Persky demanded that Losurdo turn over to him a certificate of deposit belonging to Microthermal. The call had been preceded by a letter from Kaplan to the Bank of New York in which Kaplan directed that the certificate be sent to Persky. Mention was made of this letter during the telephone conversation with Losurdo. Kaplan had sent Persky a copy of this letter and so it was reasonable to infer that the caller was actually Persky. Moreover, Losurdo had written the telephone of Persky's firm below Persky's name on the letter received from Kaplan. Finally, Galanis testified that after he learned of the call to Losurdo, he contacted Persky and berated him for calling the bank. Persky was silent during this reprimand, thereby strengthening the impression that it was he who made the call.

Persky argues that all this circumstantial evidence is for naught, because the testimony of con-conspirator Fischer accounts for all the calls to Losurdo. Fischer did testify that he spoke with Losurdo on two occasions,[10] but the topic of these conversations according to Fischer was the earlier call to Losurdo from Persky. Obviously Fischer's testimony as to his calls with Losurdo does not account for the "Persky" call to Losurdo. Indeed, it seems most improbable

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10 Losurdo testified that he could not recall any conversations with a Fischer.

that Fischer, who arranged the certificate ruse, would endanger the success of the operation by making such a call in a futile attempt to obtain the certificate itself. We conclude then that there was sufficient circumstantial evidence to permit the jury to find that Persky had made this phone call. *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States* v. *Lo Bue*, 180 F.Supp. 955, 956 (S.D.N.Y. 1960), *aff'd. sub nom. United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied sub nom. Guippone* v. *United States*, 372 U.S. 959 (1963). See *United States* v. *Bonanno*, 487 F.2d 654, 659 (2d Cir. 1973); *Van Riper* v. *United States*, 13 F.2d 961, 968 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926).

Appellant Persky also assails the court's ruling that limited to five the number of character witnesses he might call before the jury. This is a matter left to the court's discretion, which was not abused. See *United States* v. *Jacobs*, 451 F.2d 530 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Petersen* v. *United States*, 268 F.2d 87 (10th Cir. 1959). Nor can we say that the court erred in any respect by using the standard jury instruction on the subject of character testimony. See *United States* v. *Minieri*, 303 F.2d 550, 554-55 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962). See also *United States* v. *Cramer*, 447 F.2d 210, 219 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).

Finally, Persky, in what appears to be a technical objection, argues that the court's use in its instruction to the jury of the phrase "certificate of deposit" when the Annual Report itself referred to "cash or cash items" was improper. Since the cash or cash items were certified by the accountants Zane and Silverman as being in the form of a certificate of deposit, the court naturally equated the two phrases for purposes of its instruction. Persky's conviction rests upon the jury's finding that he personally knew the accountants were certifying the existence of cash and

cash items on the basis of a nonexistent certificate. The court's instruction on the certificate and on the need for finding personal knowledge of the falsity of the Annual Report was appropriate and sufficient.

Zane and Silverman

Zane and Silverman argue that the trial court deprived them of their right to call Morton Kaplan, president of Microthermal, as a witness. This claim is based on certain statements made by the court when it sentenced Kaplan on the date when the government rested its case against appellants, after Kaplan had before trial pleaded guilty to the conspiracy count. Before sentencing Kaplan the court expressed its opinion that Kaplan's statements at the time of his plea, several of which Zane and Silverman claim tend to exonerate them, were false. Zane and Silverman, relying on *Webb* v. *Texas*, 409 U.S. 95 (1972), now argue that this judicial expression of disbelief was error because it dissuaded Kaplan from testifying at trial in their favor. We disagree.

Two days before the scheduled sentencing, the court specifically inquired of counsel whether Kaplan was going to testify for Zane and Silverman. The court had expressed a willingness to defer the sentencing if Kaplan was in fact going to testify. The response of counsel for Zane and Silverman indicated that they had no plans to call Kaplan as a witness. On the next trial day after the sentencing of Kaplan, however, they suddenly developed an interest in Kaplan as a witness. Apparently this change of heart coincided with their motion for a mistrial based on the court's comments to Kaplan at his sentencing, upon which they now sought to find a way of capitalizing. The court properly denied the motion after learning that counsel for Zane and Silverman had not even attempted to subpoena Kaplan

as a witness. In fact, Kaplan's attorney informed the court that Kaplan was still available to testify if called by any party. This communication belies appellants' claim that the judge's comments at sentencing somehow dissuaded Kaplan from testifying. In any event the appellants' failure to call or subpoena Kaplan as a witness disposes of any claim they might have, see *United States* v. *Sanchez*, 459 F.2d 100 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972); see also *United States* v. *Sclafani*, 487 F.2d 245 (2d Cir. 1973), this particularly so when appellants had led the court to believe shortly before sentencing that they had no interest in calling Kaplan.

The failure to call Kaplan as a witness though he was available likewise disposes of appellants' argument that they should have been permitted to introduce the transcript of Kaplan's statements at sentencing. There was no justification for introducing the transcript, even if it assumed not to fall within the proscriptions of the hearsay rule, for Kaplan was available to testify in person. See *United States* v. *Puco*, 476 F.2d 1099, 1106 (2d Cir. 1973); *United States* v. *Jones*, 400 F.2d 134 (9th Cir. 1968), *vacated on other grounds*, 395 U.S. 462 (1969). See also Rule 804 of the Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 438. Moreover, we find no basis under the declaration-against-penal-interest exception for admitting this hearsay evidence. The statements were not, as appellants would have us believe, against Kaplan's penal interests; on the contrary, if believed, the statements would tend to exculpate Kaplan (and by inference, Zane and Silverman). Finally, we find no error in the "missing witness" instruction given the jury with respect to Kaplan.

The only other point of any substance raised by Zane and Silverman relates to their request for a line-up or other

informal identification before Yamada was permitted to identify them in open court. The identification issue assumed some importance because Yamada was to testify that he had met Zane only once, at a conspiratorial meeting that Zane himself denied attending, and that he had met Silverman twice. Zane maintains that Yamada would have been unable to identify him but for an impermissibly suggestive in-court confrontation when for a moment Persky (whom Yamada had identified), Zane and Silverman were seated alone at the defendants' table. Thereafter Yamada pointed out Zane and Silverman, stating that he did not know which person was Zane and which was Silverman. Zane and Silverman had made their original requests for a line-up before Yamada came to the witness stand.

In appropriate cases the question of suggestive in-court identification might best be obviated at the outset by ordering a line-up—as the court surely has power to do. *United States* v. *Ravich*, 421 F.2d 1196, 1202-03 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). See *United States* v. *Soles*, 482 F.2d 105, 109 n.7 (2d Cir.), *cert. denied*, —— U.S. —— (1973); *United States* v. *Fernandez*, 456 F.2d 638, 641 n.1 (2d Cir. 1972). However, we do not find that the court's failure to order such a line-up here amounted to an abuse of discretion. The so-called "Rozzo" meeting in May or June 1970, testified to by Yamada as the occasion when he saw Zane and as one of the two occasions when he saw Silverman, lasted in excess of an hour. Silverman's own testimony also confirmed that he and Yamada had met once prior to the "Rozzo" meeting. Under these circumstances, while a hearing on the identification issue might, if requested (which it was not), have been advisable, see *United States* v. *Kaylor*, —— F.2d —— (2d Cir. Oct. 15, 1973), Slip Opin. 5471, 5458-59; *United States* v. *Mims*, 481 F.2d 636 (2d Cir. 1973), it appears most unlikely that the in-court

confrontation, even if labelled impermissibly suggestive, was the source of Yamada's identification. But even assuming it to have been capable of taint, the potential error was clearly harmless since Yamada's testimony as to the presence of Zane and Silverman at the "Rozzo" meeting was merely cumulative. Two other government witnesses, Galanis and Burns, whose identification of Zane and Silverman was unquestioned, placed the two accountants at the conspiratorial meetings. Yamada's identification of Zane and Silverman was in no sense central to this case. See *United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714 (2d Cir.), *cert. denied*, 406 U.S. 927 (1972); *United States* v. *Abbate*, 451 F.2d 990 (2d Cir. 1971); *United States* v. *Baker*, 419 F.2d 83 (2d Cir. 1969), *cert. denied*, 397 U.S. 976 (1970).

We have examined all of the other points raised by the defendants on this appeal and find that none of them warrants discussion. The judgment of the district court is affirmed.

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 30th day of April, one thousand nine hundred and seventy-four.

Present:

Hon. J. Edward Lumbard,
Hon. Walter R. Mansfield,
Circuit Judges.
Hon. Murray I. Gurfein,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON S. KAPLAN, PHILIP ZANE, JEROME E. SILVERMAN, CHARLES J. FISHER, ROBERT S. PERSKY, RAMON N. D'ONOFRIO and U. S. SECRETARIAL INSTITUTE, Ltd.,

Defendants,

JEROME E. SILVERMAN, PHILIP ZANE, ROBERT S. PERSKY,

Defendants-Appellants.

Docket No. 73-2401

A petition for a rehearing having been filed herein by counsel for the appellant, Robert S. Persky

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Order Staying Mandate.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of May, one thousand nine hundred and seventy-four.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON S. KAPLAN, PHILIP ZANE, JEROME E. SILVERMAN, CHARLES J. FISHER, ROBERT S. PERSKY, RAMON N. D'ONOFRIO and U. S. SECRETARIAL INSTITUTE, Ltd.,

Defendants,

JEROME E. SILVERMAN, PHILIP ZANE, ROBERT S. PERSKY,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellant Robert S. Persky by notice of motion dated April 25, 1974 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

Granted.

J. EDWARD LUMBARD,
U. S. C. J.
WALTER R. MANSFIELD,
U. S. C. J.
MURRAY I. GURFEIN,
U. S. D. J.
Circuit Judges